(3)

IN THE HIGH COURT OF JUDICATURE AT BILASPUR

CRIMINAL APPEAL NO. 405 /2002

APPELLANT (in Jail) : Pawan Kumar, S/o Lakhanlal Bhashkar, aged 27 years, R/o Village- Kisan Parsada, P.S.Masturi, District Bilaspur (C.G.).

-VERSUS-

RESPONDENT : State of Chattisgarh through Police Station Masturi, District Bilaspur.

APPEAL U/S 374 (2) OF THE CODE OF CRIMINAL PROCEDURE

(30)

HIGH COURT OF JUDICATURE CHHATTISGARH: BILASPUR (C.G.)

DIVISION BENCH* - HON'BLE SHRI K.H.N. KURANGA, CJ &
HON'BLE SHRI L.C. BHADOO, J

CRIMINAL APPEAL NO.405 OF 2002

AND

CRIMINAL APPEAL NO.412 OF 2002

JUDGMENT FOR CONSIDERATION

Sd/-
L.C. Bhadoo
Judge

HON'BLE THE CHIEF JUSTICE

I agree

Sd/-
Chief Justice

POST IT FOR: 27/ /06/2003

Sd/-
L.C. Bhadoo
Judge

(31)

HIGH COURT OF JUDICATURE CHHATTISGARH: BILASPUR (C.G.)

DIVISION BENCH*: HON'BLE SHRI K.H.N. KURANGA, CJ
& HON'BLE SHRI L.C. BHADOO, J

Criminal Appeal No.405 of 2002

Pawan Kumar

Versus

State of Chhattisgarh

And

Criminal Appeal No.412 of 2002

Gourishankar

Versus

State of Chhattisgarh

Present: Mr. G.S. Ahluwalia, Advocate for the appellants.
Mr. Prafull Bharat, P.L., for the State/respondent.

J U D G M E N T
(Delivered on 27th of June, 2003)

The following Judgment of the Court was delivered by *L.C. Bhadoo, J.* -

Since Criminal appeal No.405 of 2002 filed by accused/appellant Pawan Kumar and Criminal Appeal No.412 of 2002 filed by Gourishankar are arising out of the same judgment and relates to the same incident and both the accused persons are real brothers, therefore, these appeals are being disposed of by this common judgment.

(32)

(2) The facts leading to filing of these criminal appeals are that both the accused/appellants are aggrieved by the judgment of conviction and sentence dated 05-04-2002, passed by the learned Additional Sessions Judge, Bilaspur in Sessions Trial No. 299 of 2000 by which the learned Additional Sessions Judge after holding the accused/appellant Gourishankar guilty of the offence punishable under Section 302 of the Indian Penal Code convicted and sentenced him to undergo imprisonment for life and to pay a fine of Rs.1,000/- in default of payment of fine to further undergo rigorous imprisonment for three months. Accused/appellant Pawan Kumar has also been held guilty of the offence punishable under Section 201 of the Indian Penal Code and he has been sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs.2,000/- in default of payment of fine to further undergo rigorous imprisonment for six months.

(3) The prosecution story in brief is that in the morning of 06/07/2000 at about 6.00 Kaushal Prasad Banjare (since deceased) left his house on cycle to take bath in the pond but thereafter he had not returned to his house. His father Chhotelal made search about his whereabouts at the places of relatives but he could not trace out his whereabouts. Therefore, on 07/07/2000 at 15.30 hours he made a missing report at Masturi Police Station which was registered at Sr. No.5/2000 and the Station House Officer N.P. Mishra started the investigation. On 11/07/2000 the Station House Officer N.P. Mishra enquired into the matter in presence of the witnesses namely Awadh Bihari (PW-2) and Manmohan (PW-3) and accused Gourishankar disclosed that he along with his brother accused No.2 Indrakumar and accused No.4 Anil Kumar had committed murder of Kaushal Prasad Banjare and thereafter after putting his dead body in a gunny bag took the body in a

tractor to Lilagar river in Devgaon near Karmu Ghat and buried the same and the cycle of deceased Kaushal Prasad Banjare has been thrown in the water in a pit near Jainramnagar. In pursuance of this information accused/appellant Gourishankar got recovered the cycle of the deceased from the water of the pit. On the cycle the name of deceased Kaushal Prasad Banjare was written. Thereafter Investigating Officer N.P. Mishra took accused/appellant Gourishankar to the Lilagar river near Karmu Ghat where accused Gourishankar informed that body of deceased Kaushal Prasad Banjare has been buried. The body could not be traced and enquiries were made from accused Pawan Kumar and on enquiry he disclosed that in the night of 06/07/2000 he along with his other brother accused No.4 Anil Kumar took out the dead body of the deceased from the place near Karmu Ghat and after digging the pit at other place the body has been buried. Thereafter the Investigating Officer N.P. Mishra reached the place where accused/appellant Pawan Kumar took him and the dead body of the deceased was recovered. On inspection of the body it was found that the hands and the legs of the deceased was tied by a rope. There was mark of injury on the head of the deceased and there was a mark of stabbing through the Baniyan in the stomach of the deceased by a sharp edged weapon. After inspection of the body the same was sent for post mortem examination to the Primary Health Centre, Masturi. On 11/07/2000 Dr. R.L. Tiwari (PW-6) conducted the post mortem of the dead body of deceased Kaushal Prasad Banjare and he opined that on account of the excessive bleeding through the wound the deceased had died and after the completion of the investigation the challan was filed in the Court of Judicial Magistrate First Class, Bilaspur who committed the case to the Sessions Court of Bilaspur from where the case was transferred to the Additional Sessions judge who after hearing the arguments framed the charges

against accused/appellant Pawan Kumar for the offence under Section 201 of the Indian Penal Code and against accused Indrakumar, Gourishankar and Anil Kumar for the offence punishable under Section 302 of the Indian Penal Code. All the accused persons denied the charges and asked for trial.

(4) The prosecution in order to prove the offences levelled against the accused persons examined in all eleven witnesses at the trial. The statements of the accused persons under Section 313 of the Code of Criminal Procedure were recorded. All the accused persons denied the statements and the evidence appearing against them and said that they are innocent and have been falsely implicated in the crime.

(5) The learned Additional Sessions Judge after hearing the arguments of the Public Prosecutor and the counsel for the accused persons passed the impugned judgment by which he convicted and sentenced accused Gourishankar and Pawan Kumar as mentioned above whereas he acquitted accused Anil Kumar and Indrakumar of the charges under Section 302 of the Indian Penal Code.

(6) We have heard Shri G.S. Ahluwalia, learned counsel appearing for the accused/appellants and Shri Prafull Bharat, learned Panel Lawyer, appearing for the State/respondent.

(7) As far as the question of nature of the death of deceased Kaushal Prasad Banjare as homicidal is concerned, learned counsel appearing for the accused/appellant has not disputed this fact. Even otherwise Investigating Officer N.P. Mishra (PW-11) has stated that on recovery of the body Panchanama was prepared and the injuries were found on the head and the stomach of the deceased. Dr. R.L. Tiwari

(PW-6) has stated that on 11/07/2000 he was posted in the Primary Health Center, Masturi and on requisition of Musturi Police Station he conducted the post morfem on the dead body of the deceased and he noticed the following injuries on the person of the deceased:

(a) Stab wound below the epigastrium measuring 5 x 3cm it was upto peritoneal cavity. Subcutaneous tissue stained with blood.

(b) Contusion on the left side of face, whole of temporal and massetor region which was extending up to the left nostril. Nosal septum crushed.

(c) Contusion on the left side of the chest over pericardium.

The doctor opined that the above injuries were anti mortem in nature. The cause of the death of the deceased was on account of the stab injury and injury to nose leading to excessive loss of blood. The post mortem report is Ex.P/12. The doctor has not been cross-examined. Therefore, in view of the above evidence of the doctor it stands proved that the nature of the death of deceased Kaushal Prasad Banjare was homicidal.

(8) Now coming to the question of involvement of accused Gourishankar in the murder of deceased Kaushal Prasad Banjare and involvement of accused Pawan Kumar in causing disappearance of the dead body of the deceased with the intention to screen his brother from the punishment of the offence of murder are concerned, in this case the whole case rests on the circumstantial evidence as there is no direct evidence and in order to prove the offences against the accused/appellants based on the circumstantial evidence it is settled law

(36)

that, in a case based on circumstantial evidence, before the Court can record conviction, it must satisfy itself that circumstances from which an inference of guilt could be drawn have been established by unimpeachable evidence led by the prosecution and that all the circumstances put together are not only of a conclusive nature but also complete the chain so fully as to unerringly point only to the guilt of the accused and are not capable of any explanation which is not consistent with the hypothesis of the guilt of the accused. It is on the basis of these principles that we shall examine the circumstantial evidence relied upon by the prosecution in this case.

(9) Now we shall proceed to examine the circumstantial evidence adduced by the prosecution in order to prove the offences against the accused persons. While convicting the accused persons the learned trial Court based its findings on the following circumstances:

(i) *On 11/07/2000 on the information given by accused Gourishankar he got the cycle of deceased Kaushal Prasad Banjare recovered to Investigating Officer N.P. Mishra.*

(ii) *Based on the information given by accused Pawan Kumar the Investigating Officer N.P. Mishra recovered the dead body of deceased Kaushal Prasad.*

Rest of the circumstance that accused Anil Kumar made extra judicial confession before Baldau Kuamr (PW-7) has not believed by the learned trial Court as Baldau Kumar has turned hostile. Similarly, since as per the information given by accused Indrakumar, the weapon of offence

namely knife was not recovered from the well, as the well being a very deep and in dilapidated condition. The recovery of the spade at the instance of accused Indrakumar was not believed by the learned trial Court and acquitted this accused and said that the recovery of the spade is immaterial and also the trial Court has not believed and relied upon the circumstance that accused Indrakumar and Anil Kumar showed the place of incident which was plastered by dung and also the recovery of the tractor and trolley was not considered by the learned trial Court as relevant.

(10) Now coming to the question of recoveries of the dead body and the cycle of the deceased at the instance of accused Pawan Kumar and Gourishankar are concerned, both the memorandum and recovery witnesses produced by the prosecution namely Awadh Bihari (PW-2) and Manmohan (PW-3) have tuned hostile. Manmohan (PW-3) has said that how Kaushal Prasad Banjare died he does not know. He had not seen his dead body. On cross examination by the Public Prosecutor he has said that it is incorrect to say that the Investigating Officer enquired from accused Gourishankar and Indrakumar in his presence and it also incorrect to say that these persons informed the Investigating Officer about the dead body and the cycle of the deceased. It is also incorrect to say that the dead body and the cycle of the deceased were recovered at the instance of the accused persons in his presence. About his signatures in the Panchanama (Ex.P/2), memorandum (Ex.P/4), statements (Exs.P/3 & P/5) and the recovery memo (Ex.P/6), he has stated that his signatures were obtained in the Police Station. Similarly Awadh Bihari (PW-2) has turned hostile and he has stated that on the fateful day he went back to his house at about 2.00 P.M., two Police Personnel came to his house and they were taking him towards the river

390

on a motorcycle. At that time one tractor was coming from the riverside in which 100-150 persons were sitting and they informed him that the dead body has been recovered and he accompanied them up to Masturi. There one Constable obtained his signatures on ten to twelve papers. He has stated that his signatures on all these Panchanama, confessional statement, memorandum, seizure memos and the map were obtained on blank papers. It is incorrect to say that the cycle and the spade were recovered in his presence or the dead body of the deceased was recovered in his presence. The learned Additional Sessions Judge has recorded his finding that even though these two recovery witnesses have turned hostile, the evidence of the Investigating Officer N.P. Mishra is worth reliance and the recovery has been proved and it is not necessary that the statement of the Investigating Officer should be supported by any independent witness. Learned counsel appearing for the accused/appellant has strongly criticized the judgment of the learned trial court on this aspect. About this fact we will discuss the recovery fact and the statement of this witness later on.

(11) In this case the prosecution has not been able to prove the motive behind the crime. Hon'ble the Apex Court in the case of ***Suresh Chandra Bahri Vs. State of Bihar*** reported in ***AIR 1994 SC 2420*** has held that sometimes motive plays an important role and becomes a compelling force to commit a crime and therefore motive behind the crime is a relevant factor for which evidence may be adduced. A motive is something which prompts a person to form an opinion or intention to do certain illegal act or even a legal act but with illegal means with a view to achieve that intention. In a case where there is clear proof of motive for the commission of the crime it affords added support to the finding of the Court that the accused was guilty for the offence charged with

But the absence of proof of motive does not render the evidence bearing on the guilt of the accused nonetheless untrustworthy or unreliable because most often it is only the perpetrator of the crime alone who knows as to what circumstances prompted him to a certain course of action leading to the commission of the crime. Therefore, in view of the principle laid down by the Apex Court in the aforesaid judgment we have to examine whether the motive in this case has some relevance. The whole case rests on the circumstantial evidence because nobody saw the accused persons assaulting the deceased or they were seen together or any circumstance which may allow the Court to raise any inference. If we see the evidence of Baldau Kumar (PW-7) even though this witness has turned hostile he has said that on the fateful day he had gone to take bath to the pond and deceased Kaushal Prasad Banjare was also present there. In his evidence he has not said that he saw the accused persons there. As per the prosecution case deceased Kaushal Prasad Banjare was coming back to his house and on the way when he was passing through the house of the accused persons they called him inside and thereafter they murdered him. This was the daytime in the village and the prosecution has not been able to adduce any evidence that somebody saw the deceased entering the house of the accused persons. In the cross examination of the Investigating Officer N.P. Mishra, it has come on record that the mother of the deceased namely Bajarhin Bai informed him that there was no enmity of the deceased with anyone. But when he posted a Head Constable for enquiring into the matter then he came to know that during the College Election the accused persons were having some grudge and animosity against the deceased and on that he called these persons and inquired then the accused persons disclosed. But the Investigating Officer has not examined or collected any evidence in order to prove as to whether

there was any animosity or grudge in the mind of the accused persons against the deceased in connection with some election. This type of evidence could have been easily collected from the institution where the accused and the deceased were studying. Therefore, in absence of this, we are of the opinion that it creates reasonable doubt and it was more necessary when the whole case was based on circumstantial evidence and the Investigating Officer should have collected the motive evidence.

(12) The recovery of the cycle has been effected from the pond which is accessible to everyone. However, the dead body of the deceased was recovered from the bed of the river which was buried under the sand and both the recovery witnesses namely Awadh Bihari (PW-2) and Manmohan (PW-3) have categorically stated that neither the accused persons were interrogated in their presence nor any recovery was made in their presence. Therefore, in the facts and circumstances of the case, the prosecution has not been able to prove the motive and the allegation against the accused persons that the deceased was taken into the house of the accused persons during the daytime in the village but no evidence has been produced. The recovery part becomes doubtful and therefore looking to the facts and circumstances of the case the recovery cannot be believed beyond reasonable doubt merely on the basis of the evidence of the Investigating Officer. The learned trial Court has acquitted the other accused Indrakumar when according to the prosecution he was the person who in fact stabbed the deceased by knife and that knife has also not been recovered and the Investigating Officer said that the knife could not be recovered since the well was deep and was in dilapidated condition. Since the weapon of offence has not been recovered then this link is also missing in this case. Moreover, the learned trial Court has not believed the fact that accused

Anil Kumar and Indrakumar took the Investigating Officer to the place of occurrence, which was recently smeared with the dung, which was also relevant evidence. Therefore, in view of the above circumstances, it is not safe to rely on the statement of the Investigating Officer about the recovery and to hold the accused/appellants guilty only on that count without any further evidence to support the recovery aspect.

(13) In view of the above, we are of the opinion that the conviction of the accused/appellant by the learned trial Court cannot be sustained for the reasons mentioned above and the judgment of the learned trial Court is liable to be set aside.

(14) In the result, the appeals of the accused/appellants are allowed. The judgment of the learned trial Court convicting the accused/appellants for the offences under Sections 302 and 201 of the Indian Penal Code and sentencing them as mentioned above are set aside. The accused/appellants be set at liberty forthwith if not required in any other case.

Sd/-
Chief Justice
27/06/2003

Sd/-
L.C. Bhadoo
Judge
27/06/2003

Brajesh*